April 10, 2003

VIA FEDERAL EXPRESS

The Honorable Mike Kreidler
State Insurance Commissioner
Office of the Insurance Commissioner
State of Washington
PO Box 40255
Olympia, WA 98504-0255

In Re: Application of Premera Blue Cross, No. G02–45

CONSORTIUM REQUEST TO SUBSTITUTE FOR
INTERVENER MEDICAL SCHOOL

Dear Commissioner Kreidler:

On Monday of last week, March 31, the Consortium of the Northwest Law Schools received a copy of the OIC staff's response to our Motion to Intervene. As we were reviewing the staff response and preparing a reply, on Wednesday, April 2, we received your order denying our Motion. We are disappointed that the action on your behalf precludes a reasoned response to the staff commentary, which in significant respects is inaccurate. Certainly, it remains our view that the Consortium Law Schools have a substantial interest in the proceedings before you and have a valuable role to play in those proceedings.

That interest and role are now of critical proportions, with the withdrawal of the University of Washington and the Office of Attorney General, on Monday, as an Intervener. As a consumer of Premera services, we hereby request substitution to represent the University's interests, as well as the broader interests of the Consortium. By this letter, we commit ourselves to accepting all agreements and requirements and conditions in place as of the date of your granting this request. Substituting us will not produce delay; it will not burden the proceedings; it will assure important public and institutional interests are represented and it will maintain badly needed expertise and advocacy in these proceedings.

In connection with this request, we wish to comment on the staff response to our Motion to Intervene. That response argues that the Consortium's failure to meet your deadline has already impaired the orderly and prompt conduct of the proceedings by requiring the preparation of the staff response. A more serious contention appears subsequently (page 3-4), to the effect that although the Consortium has committed itself to accept all actions by the commissioner through the date of intervention, the Consortium is not privy to the actions of the parties off record and that "it is unlikely that the Consortium could accept, sight unseen, all of the provisions negotiated without its participation." In fact, accepting

those was implicit in the commitment made in the Consortium's Motion and the Consortium, by this letter, is prepared to accept any provisions negotiated by the present parties bearing upon the issues in this case. If your staff had placed a simple phone call, it could have determined that that is the Consortium's position.

The same comments apply to the assertion (page 4) that the Consortium has not indicated it intends "to accept any limitations on its participation in these proceedings if granted intervener status." Of course we would. Implicit in our motion was the understanding that you might limit our participation in any way which seemed appropriate to avoid disrupting the proceedings. It is simply unfounded for the staff to assert (page 4) that if the Consortium is granted intervener status "it will further burden these proceedings." Quite the opposite, we would accept any limitations imposed by the Commissioner and proceed within those. A simple phone call by a member of your staff would have established this and could have worked out the terms.

The staff response then goes on to argue that the Consortium does not possess a "significant interest affected by the proposed transaction." (Page 5-6). This apparently is because there is "no allegation that the members ever purchased or provided benefits through Premera." Surely, even a moment's reflection by the staff would have made it plain that the same health plan obtaining at the University of Washington Medical School (now withdrawn as intervener) applies at the University of Washington School of Law, and that Premera benefits extend throughout the University of Washington's system. A simple phone call, if one were necessary, would have established that fact.

More importantly, the staff response utterly ignores the Consortium schools' interest in the impact which the Premera conversion would have on other insurance providers, other health care providers and health care consumers throughout the Northwest. Anyone familiar with the structure of health care, regionally and nationally, and the developments over the past decade, well understands that when a billion dollar player makes a major shift in structure and function, the impact powerfully affects the consumers and the providers throughout the area.

As noted by the Consortium's motion, that familiarity and that expertise are both amply available through the Consortium members. As to those resources, your staff commented that the "Consortium pays short shrift to the substantial, albeit not enormous, legal resources marshaled by the OIC staff." (Page 6). Quiet the opposite. Your legal staff and that of the Attorney General (now departed) are well regarded, and appropriately so. But thoughtful attorneys advising you in a proceeding of this magnitude and novelty should welcome, not rebuff, offers of assistance. To oppose an offer of additional resources, in the face of a multi-billion dollar application, is curious at best. Thus, your staff response itself causes us to reaffirm our belief that this proceeding would benefit from our offer of additional expertise and resources. That belief is now dramatically enhanced by the withdrawal of the Medical School, and with it, the Office of the Attorney General.

Finally, your staff suggests that the Consortium plan for a Center on Health Care Law, Policy and Advocacy should be more appropriately reserved for consideration by the Attorney General's office. Certainly, under your earlier orders ultimate resolution may reside with the Attorney General. But the fact of such a proposal is, contrary to your staff argument, relevant at this point. It expands the Consortium's interest in the subject of this proceeding, to the extent the proceeding concerns evaluation of assets. More importantly, it is directly relevant to whether the public interest is diserved by Premera's conversion. While it may be true that your office will not make decisions on the ultimate distribution of assets, certainly your office should consider whether the public interest is served by any distribution of

assets, and in what form.

One final observation. Your staff response argues that the Consortium member law schools have nowhere justified their failure to meet your November deadline for intervention. We, of course, in fact, gave a number of reasons in our Motion itself. But, more to the point, our failure to energize and meet the deadline was in part born of ignorance of the deadline and, in turn, that ignorance was a product of the lack of a watchdog agency or an advocacy center which might apprise groups around the region when an important proceeding has set a deadline affecting them. That watchdog function, conducted by a research and advocacy center, is precisely the kind of function which the Consortium has in mind for the center proposed. Absent such a center, it is highly likely that a number of groups throughout the Northwest, all of which have a substantial interest in your proceeding, simply had (and still have) no notice of your November deadline. In the future, having a center in place would mean that your deadlines would be more effectively observed and your proceedings would be more adequately supported.

In short, we remain of the view that we qualify as interveners. The Consortium Law Schools spend millions on health care insurance (including Premera's), on behalf of thousands of students and hundreds of staff members. Health care costs increasingly represent a major portion of our budgets and a factor of disequilibrium in our planning. When a major player in the region, such as Premera, proposes a major shift in role and funding and participation, the implications directly affect the Consortium members in a profound way. Our interest is no longer represented now that the Medical School has withdrawn. Hence, we request substitution.

The Consortium has very carefully considered the position it must take in the light of your decision, which we received last week, only two days after the staff memorandum. Realistically, and with appropriate deference, we conclude we must accept your finding that, within your administrative discretion, you "do not find good cause for delay of almost four months." (Page 2). We would note, that we hope it is obvious the delay involved here is not akin to the dereliction or negligence of a party to a case in failing to comply with a notice as to which it has had direct service. We would also add that, if we are substituted as an intervener, we would of course attend to all deadlines and comply with all time requirements, as well as all other requirements of the proceeding.

The Consortium members respectfully disagree with your conclusion that permitting us to intervene "at this late date is not in the interests of justice and would impair the continued orderly and prompt conduct of the proceedings." Still, we do understand that there may be appropriate concern on that score. Where we must express profound disagreement is with the findings at pages 3 through 5, that the Consortium does not have a "significant interest." In fairness, we must observe that the Commissioner's conclusion that the "thrust of the Consortium's Motion is a desire to advocate Northwest regional solutions" and "to that end it desires to present its plan in these proceedings for the creation of a Northwest Center," misconceives the interest of the Consortium. As noted above, we well understand that in an earlier Order you left for the Attorney General the review of transfer of assets. Moreover, as noted above, the Consortium members' interest in these proceedings stems directly from the member schools' roles as purchasers and providers of health care insurance. In that sense, our interest is quite similar of that of other interveners, including the Medical School. What we attempted to do in our Motion was not only to note that similarity but to delineate unique aspects of our interest, so that adding us to the proceedings would assist your consideration of the complex and difficult issues before you.

We are concerned particularly with the comments at pages 4-5 that Lewis and Clark is "apparently the lead member," and that "there is little to no detail as to the schools' past or current

relationship with Premera," and that the Washington law school's "interests are being represented and considered in these proceedings." These observations are simply factually inaccurate. Indeed, if the Consortium Law Schools interests are already represented, then it follows they have an interest, as interveners. But in fact that interest, as institutional consumers, was not adequately represented. And the withdrawal of the Medical School leaves an even greater vacuum, which can only be filled by substituting us as interveners.

Our concern is that your finding of "no interest" may, in a subsequent proceeding, be deemed res judicata. Should we ultimately seek to obtain judicial review of any order entered by you in this proceeding, we will doubtless be met at that point by a contention that we lacked standing before you and, therefore, we lack standing in court. The same argument may be advanced when we seek to participate before the Attorney General. To avoid what we hope is an unintended consequence of your Order, to cut off subsequent participation on our behalf, we would request that you withdraw that portion of your Order which, beginning page 3, finds the Consortium lacks a "significant interest" under Washington statutes. As noted, in our view, you are within your discretion in the prior finding that intervention is time-barred. In a sense, then, the subsequent finding that we lack a significant interest is not necessary to your Order and, as footnote 2 notes, the finding was made in the absence of "additional information that would satisfy me that they have in their own right a "significant interest" that will be effected by the conversion."

We specifically request that you withdraw that finding of a lack of significant interest. In the alternative, we request time to respond to the staff's response, in a motion which we would file requesting reconsideration of your order denying intervention, to provide the missing facts. This would all be unnecessary, of course, if you grant our present request to substitute for intervener Medical School.

Looking ahead, on the possibility that we will not be allowed to intervene, we anticipate participating through public commentary and written submissions before the Commission. To that end, we request assurance that all matters on which your ultimate decision will rest will be a matter of public record and be made available to us in the same timing and in the same manner as to the interveners. That is, we anticipate, there will be depositions, discovery and disclosure, affidavits and exhibits, and live testimony, all of which would become part of the basis of your ultimate decision. As those materials become available, we request timely access. We also request an opportunity to brief and comment upon those materials, as well as on the ultimate merits.

Please be assured that we will abide by any limitations imposed by your office on such access, review and commentary. The same is true if we are permitted to substitute as intervener. We have no intention to delay or obstruct the proceeding. In fact, we would hope it would be obvious, our hope is to illuminate and facilitate the proceedings. This request for access and commentary, realistically, simply reaffirms our commitment to the proceeding, to your reasoned resolution of the issues therein, and to our substantial stake in the delivery and finance of health care insurance in the Northwest.

Earlier in this letter, we noted that your staff might have eased this process by a simple phone call. Let us now extend that same invitation. If any of the requests in the preceding paragraphs are problematic, we would be happy to discuss their resolution with your staff and to accommodate your needs and their desires. We do not see a need for proliferating paperwork needlessly or engaging in obstructive delay.

Finally, we request that this letter be posted to the Premera website which your office maintains.

Other letters have been posted on that website by various of the participants, for varying purposes. Indeed, a Premera response to our motion appears now on your website. The reason we request that this letter be posted is simply otherwise a visitor to the website will find your staff response to be unanswered by us and will find your order to be unchallenged. In fairness to the public, for whom you have created this website, and in fairness to the Consortium members, it would be best to avoid a misleading portrayal of the situation. We therefore request that this communication be posted to the website. As with other matters raised in this letter, we will be happy to discuss the matter with your staff at their convenience.

However, to repeat our earlier request, and to end on that note, we specifically request that we be substituted for the University of Washington Medical School as an intervener. We have much the same interest. We will assume all their commitments. Adding us will delay nothing. And without them and us, this proceeding will be seriously deficient in resources and public representation, with the loss of a major intervener and consequent withdrawal of the Office of the Attorney General, and the public interest will be in serious jeopardy.

Very truly yours,

Arthur B. LaFrance
Professor of Law

ABL:lc

cc: Carol Sureau
John F. Hamje
James T. Odiorne
Jeff Coopersmith
Amy McCullough
Eleanor Hamburger
Dina L. Yunker
Thomas Kelly
Michael Madden
John P. Domeika